Supreme Court U.S.
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No. 02-242

IN THE

Supreme Court of the United States

MANUEL DE LLANO,

Petitioner,

v.

DUANE BERGLUND, DAVID DANBOM, ALLAN G. FISCHER, MICHAEL GARRISON, RICK D. JOHNSON, ANDY KEOGH, JIM L. OZBUN, JIMMIE RICHARDSON, CHARLES A. SAWICKI, AND SHARON A. SIVERTS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE AND FACTS

Respondents Duane Berglund, David Danbom, Allan G. Fischer, Michael Garrison, Rick D. Johnson, Andy Keogh, Jim L. Ozbun, Jimmie Richardson, Charles A. Sawicki, and Sharon A. Siverts (hereinafter referred to collectively as the "NDSU Employees") do not dispute the factual allegations set forth in Petitioner Manual de Llano's ("de Llano") Petition for a Writ of Certiorari ("Petition"). However, to provide this Court with a full understanding of the process afforded de Llano at the time of his termination, the NDSU Employees provide the following facts.

In accordance with the NDSU Policy Manual, on February 23, 1994 Dean Allan Fischer and Dr. Charles Sawicki provided de Llano with a written notice of intent to terminate. (Appendix pp. 110-111). Thereafter, on March 9, 1994, President Jim Ozbun provided de Llano with a written Notice of Dismissal. (Appendix 112-113). In his Notice of Dismissal, President Ozbun identified the following grounds for de Llano's dismissal:

- Complete and utter lack of collegiality and cooperation with peers resulting in 3 censures making de Llano's continued effectiveness in the department impossible;

- Harassed physics department staff;

- Refused to present complaints through proper channels after repeated warnings and misrepresented facts to other university employees;

- Libeled the physics department chair and dean with false accusations;

- Failed to correct deficient behavior even after receiving two letters of reprimand;

- Excessive filing of frivolous grievances with the intent to harass employees and supervisors.

Id.

On March 15, 1994, counsel for de Llano requested additional particularity regarding de Llano's dismissal. On March 22, 1994, de Llano's counsel was provided with copies of de Llano's first and second reprimands, Dr. Sawicki's December 7, 1993 memo setting forth de Llano's inappropriate behaviors and a summary of grievances filed by de Llano. (Appendix p. 117).

Under the relevant NDSU policies, a terminated tenured faculty member has an opportunity to have the termination reviewed by two different committees. The faculty member may first have the termination reviewed by a Special Review Committee ("SRC") which attempts to find a resolution acceptable to both the faculty member and the administration. The SRC process is informal and concludes with the issuance of SRC recommendations. If the SRC recommendations are not adopted by both parties, the faculty member may then have the termination reviewed by the Standing Committee on Faculty Rights ("SCFR"). The SCFR is composed of tenured faculty members chosen by the NDSU Senate. During this internal review process, the faculty member remains employed.

Following President Ozbun's Notice of Dismissal, de Llano requested that his termination be reviewed by the SRC. On April 8, 1994, de Llano sent a letter to the SRC setting forth his reasons for challenging the termination. In his April 8, 1994 letter, de Llano contended that he had completely fulfilled his institutional responsibilities and, therefore, his termination was improper. (Appendix p. 118). Several physics department faculty members also submitted letters to the SRC supporting de Llano's termination.

On August 15, 1994, the SRC issued its report recommending that sufficient grounds for dismissal did not exist. On September 22, 1994, President Ozbun informed de Llano that he was not adopting the SRC's recommendations and was upholding de Llano's termination. (Appendix 140). President Ozbun rejected the SRC recommendation based on its failure to consider de Llano's insubordinate actions in failing to stop his destructive and uncollegial behavior. *Id.*

In response to the President's letter, de Llano wrote a letter to the President dated September 26, 1994 wherein de Llano once again set forth his position and the justifications for his inappropriate actions. (Appendix p. 142). In particular, de Llano stated in his September 26, 1994 letter that the problems in the physics department were caused by Dr. Charles Sawicki editing faculty meeting minutes and not allowing all faculty access to departmental files. *Id.*

De Llano appealed his termination to the SCFR (consisting of NDSU faculty members, Berglund, Danbom, Garrison, Keogh and Richardson). On April 10-11, 1995, a formal hearing was held before the SCFR. At the hearing, de Llano was represented by counsel. During the two-day hearing, de Llano's counsel cross-examined each of

NDSU's nine witnesses and entered several exhibits into evidence. Furthermore, de Llano called three witnesses, including himself.

The SCFR issued its recommendations on May 12, 1995 finding that NDSU established adequate cause to dismiss de Llano. In its Findings of Fact, the SCFR stated:

> . . . We find by clear and convincing evidence that Dr. de Llano engaged in a continuous course of conduct demonstrating a total disregard for professional integrity. After de Llano was removed as Chair at the request of the faculty in the department, he attempted to strike back at the department, the Chair, the Dean and the University. He has intentionally and consciously misrepresented facts about the department, the Dean and the institution for the purpose of discrediting and harming his colleagues. He has knowingly made false accusations of fact regarding the Dean and the Chair, e.g., allegations of ethnic or racial bias. He has been reprimanded twice, and censured on three occasions by his physics department colleagues, but has failed to change his conduct. . . .

(Appendix p. 149).

The SCFR recommendations were adopted by President Ozbun on May 15, 1995 and de Llano's salary and fringe benefits were terminated that same day. (Appendix p. 152).

On May 26, 1995, de Llano appealed his termination to the North Dakota Board of Higher Education. In his appeal to the Board of Higher Education, de Llano never asserted that his federal pre-termination due process rights had been violated.

On December 3, 1996, the Board of Higher Education hearing officer issued her Recommended Findings and Recommended Order. The hearing officer recommended that, based upon the evidence introduced at the SCFR hearing, de Llano's termination be upheld. The Board of Higher Education adopted the hearing officer's recommendations on February 20, 1997. In her findings, the hearing officer specifically found:

> After his termination as chair and prior to his termination from employment, Dr. de Llano deliberately spread false and misleading information within the University, community and State about the Department in an attempt to make it appear the Department was failing under Dr. Sawicki and Dr. Fischer's administration.
>
> . . .
>
> All faculty in the Department testified that Dr. de Llano was not an effective member of the Department. They testified that his conduct had not only substantially impaired Dr. de Llano's ability to fulfill his institutional responsibilities within the Department, but also harmed the Department in that his actions had significantly hindered their effectiveness within the Department.
>
> . . .

> The evidence of record shows that Dr. de Llano's conduct and actions within the Department of Physics had a negative, disruptive effect on the working's of the Department and resulted in significant interference to other faculty and the chair of the Department in the performance of their duties.

(Appendix pp. 162-163).

SUMMARY OF THE ARGUMENT

In his Petition, de Llano challenges the Eighth Circuit Court of Appeals decision affirming the District Court's grant of summary judgment on his Fourteenth Amendment procedural due process claim. De Llano contends that the Circuit Court erred in failing to find that he did not receive a meaningful opportunity to be heard.

In particular, de Llano states in his Petition that the recommendations of the SRC finding that sufficient grounds did not exist for his termination were final and binding upon NDSU's President. Thus, de Llano asserts that the actions of the NDSU Employees after the SRC recommendations violated his federal procedural due process rights. In other words, de Llano argues that certain alleged violations of NDSU's termination policies amount to a federal due process violation.

De Llano's assertion, if true, would at most amount to a state law cause of action and not a federal constitutional claim. De Llano's arguments relating to the SRC relate solely to procedures prescribed by NDSU, not the United States Constitution. Alleged violations of due process in the

deprivation of a protectable interest are to be measured against a federal standard of what process is due and that standard is not defined by state-created procedures.

The federal procedural due process standard adopted by this Court requires notice and an opportunity to be heard. In his Petition, de Llano does not dispute that he was provided ample notice of the basis for his termination. Likewise, de Llano acknowledges that he was provided at least three opportunities to present his side of the story including once to the administration, once to the SRC and once to the SCFR. Accordingly, under the applicable federal law, de Llano received all of the process to which he was due.

Furthermore, de Llano's contention that the SRC decision is final and binding is completely meritless. The NDSU policies unquestionably reveal that the SRC serves as a mediator to resolve disputes early. If the SRC's decision is not mutually acceptable, then the SRC recommendation is non-binding on any of the parties.

Accordingly, the facts and applicable law unquestionably establish that the Eighth Circuit Court of Appeals decision is correct and, therefore, de Llano's Petition should be denied.

REASONS FOR DENYING THE PETITION

In his Petition, de Llano contends that review of this matter by this Court is appropriate since the NDSU Employees' actions in terminating his employment were *ultra vires* and, therefore, violated his federal procedural due process rights.

The exclusive basis set forth by de Llano in support of his *ultra vires* assertion is that NDSU President Ozbun lacked any authority to reject the recommendations of the SRC. De Llano maintains in his petition that the SRC's decision was final and binding on NDSU and its administrators. Accordingly, de Llano contends that even though he subsequently sought review of his termination by the SCFR, any termination actions taken by the NDSU Employees after the SRC decision were *ultra vires* and in violation of his federal procedural due process rights.

De Llano's contention that the allegedly *ultra vires* actions of the NDSU Employees amounts to a federal procedural due process violation is clearly flawed.

1. FEDERAL PROCEDURAL DUE PROCESS RIGHTS BASED UPON FEDERAL LAW, NOT STATE LAW

As de Llano's Petition reveals, his sole request is to have this Court review and interpret NDSU's internal termination policies to determine if the SRC recommendations were final and binding. If de Llano's contentions are, in fact, true, then he may have a viable claim under applicable state law. However, a violation of state procedures does not amount to a violation of federal procedural due process.

Both the District Court and the Eighth Circuit Court of Appeals addressed this very issue and consistently concluded that de Llano's assertion, even if true, would at most amount to a state law cause of action and not a federal constitutional claim.

The procedural process due a terminated tenured government employee under the Fourteenth Amendment was outlined by this Court in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). In *Loudermill*, this Court stated:

> The essential requirements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.

Id. at 546 (citations omitted). *See also Zinermon v. Burch*, 494 U.S. 113, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990).

Guided by this Court's decision in *Loudermill*, appellate court's have uniformly concluded that the alleged failure of a state agency to follow its internal regulations or applicable state laws does not amount, in itself, to a violation of federal due process rights.

In *McDarby v. Dinkins*, 907 F.2d 1334 (2d Cir. 1990), the plaintiff, a retired police officer, contended that his federal due process rights had been violated by the failure of the local agency to determine his disability category as required

under the city's administrative code. Finding that the plaintiff had received adequate notice and an opportunity to be heard, the district court granted the defendants' summary judgment motion. The plaintiff appealed the dismissal. On appeal, the Second Circuit Court of Appeals affirmed the dismissal and held:

> Although we question whether the Board's actions satisfy the requirements of the Administrative Code, the Board's failure to adhere to those requirements does not, without more, constitute a deprivation of procedural due process under the federal constitution. . . .
>
> A breach of procedural requirements does not create a due process violation unless an individual was denied a fair forum for protecting his state rights. . . . Indeed, a contrary rule would bring within the scope of section 1983 myriad claimed violations of local laws, thus confusing the separate provinces of state and national laws that are central to our federal system. . . .
>
> . . .
>
> When the minimal due process requirements of notice and hearing have been met, a claim that an agency's policies or regulations have not been adhered to does not sustain an action for redress of procedural due process violations.

Id. at 1337-1338 (citations omitted).

Likewise, the Fourth Circuit Court of Appeals held in *Riccio v. County of Fairfax*, 907 F.2d 1459 (4th Cir. 1990):

> Alleged violations of due process in the deprivation of a protectable interest are to be measured against a federal standard of what process is due and that standard is not defined by state-created procedures, even when those state-created procedures exceed the amount of process otherwise guaranteed by the federal constitution.

Id. at 1469; *see also Schuler v. University of Minnesota*, 788 F.2d 510, 515 (8th Cir. 1986) (factual issue of University's compliance with internally prescribed procedural rules need not be resolved upon a finding that plaintiff received constitutionally adequate process); *Osteen v. Henley*, 13 F.3d 221, 224 (7th Cir. 1993).

As the above-cited appellate decisions establish, NDSU's compliance or non-compliance with internally prescribed procedural rules is irrelevant in determining whether de Llano received constitutionally adequate process. Accordingly, what, if any, binding effect the SRC decision had under state law has no relevance in this Federal due process action. Instead, the sole inquiry under federal procedural due process law is whether de Llano was given notice and an opportunity to present his side of the story.

a. DE LLANO RECEIVED MORE THAN THE REQUIRED NOTICE OF THE BASIS FOR HIS TERMINATION

From the inception of de Llano's efforts to undermine the physics department, de Llano was informed that his behavior was not acceptable and that his behavior must change or he may be dismissed. The notices received by de Llano included:

(1) July 24, 1992 letter from Dr. Sawicki to de Llano wherein de Llano was instructed to resolve departmental problems within the department and to stop harming the department by airing departmental complaints in the university and community (Appendix pp. 34-35);

(2) August 10, 1992 letter from Dr. Sawicki to de Llano again requesting de Llano to stop sending out letters attacking the department (Appendix p. 36);

(3) December 3, 1992 Letter of Reprimand from Dean Fischer to de Llano addressing de Llano's continuing lack of collegiality and poor performance in the introductory physics class (Appendix pp. 43-44);

(4) February 23, 1993 Physics Department Rules of Order enacted in hopes of forcing de Llano to address problems in the department rather than maliciously attacking the department in the community (Appendix pp. 50-53);

(5) March 22, 1993 faculty evaluation signed by de Llano discussing de Llano's failure to change his insubordinate and uncollegial behavior (Appendix pp. 48-49);

(6) November 4, 1993 letter from Dr. Sawicki again addressing de Llano's lack of collegiality and efforts to destroy the physics faculty and dean (Appendix p. 77);

(7) November 26, 1993 censures by the physics department for harassing the department secretary and missing crucial departmental meetings (Appendix pp. 78,82);

(8) December 10, 1993 Second Letter of Reprimand addressing de Llano's failure to change his destructive behaviors despite numerous requests and warnings (Appendix pp. 91-106);

(9) February 23, 1994, Dean Fischer and Chairman Sawicki presented de Llano with a written notice of intent to terminate;

(10) March 9, 1994, President Ozbun presented de Llano with a notice of dismissal;

(11) Review of termination by SRC; and

(12) Hearing before SCFR.

Each of the grounds listed in the notice of intent to terminate and Notice of Dismissal related to the contents of numerous letters, censures and reprimands given to de Llano

since 1992. In addition, on March 22, 1994, de Llano's legal counsel was provided with copies of de Llano's reprimands and the December 7, 1993 memo from Dr. Sawicki discussing de Llano's inappropriate behavior. (Appendix p. 117). Finally, two pre-termination reviews were held where evidence was introduced establishing the basis for de Llano's termination. *See Young v. City of St. Charles*, 244 F.3d 623, 627 (8th Cir. 2001) (notice in the form of two pre-deprivation hearings adequate under Due Process Clause); *Riggins v. Board of Regents of University of Nebraska*, 790 F.2d 707, 710-711 (8th Cir. 1986) (employee received adequate notice when allowed to review report regarding insubordination and had report read to her); and *Agarwal v. Regents of University of Minnesota*, 788 F.2d 504, 508 (8th Cir. 1986) (letter setting forth reasons for professor's termination sufficient under Due Process Clause). Thus, the facts reveal that de Llano had pre-termination notice of the basis for his termination and the evidence supporting it, a point which de Llano does not challenge in his Petition.

b. DE LLANO GIVEN OPPORTUNITY TO PRESENT HIS SIDE OF THE STORY ON SEVERAL OCCASIONS

In addition to receiving more than the required notice, de Llano was also given several opportunities to respond to NDSU's termination decision. In a letter dated April 8, 1994 to the SRC, de Llano set forth his reasons for challenging his termination. (Appendix p. 118). Furthermore, after President Ozbun rejected the SRC's recommendation, de Llano sent the President a letter dated September 26, 1994 wherein he again disputed the basis for his termination. (Appendix p. 142). Finally, during a fifteen hour hearing

before the SCFR on April 10-11, 1995, counsel for de Llano had the opportunity to hear and examine NDSU's witnesses and call witnesses. (Appendix pp. 327-852). Thus, there can be no dispute that de Llano had an opportunity to and did present his side of the story.

As the District and Appellate Courts correctly concluded, de Llano received all of the procedural due process to which he was entitled under federal law. While, according to de Llano, the procedure afforded to him differed from that outlined in the NDSU policies, such alleged discrepancies do not and should not amount to a violation of federal procedural due process. To find such procedural discrepancies a violation of federal due process would require this Court to prescribe how the NDSU Employees should have applied state law. As this Court stated in *State School & Hosp. v. Halderman*, 465 U.S. 89, 106, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984):

> . . . it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.

To avoid such an intrusion in this matter, this Court must deny de Llano's Petition for a Writ of Certiorari.

2. FACTS ESTABLISH SRC SERVED AS MEDIATOR AND ITS RECOMMENDATIONS WERE NOT BINDING ON ANY PARTY

In his Petition, de Llano has requested that this Court remand this matter to the Appellate Court to determine whether the NDSU Employees violated the NDSU

termination policies and procedures. While such an inquiry has been strongly discouraged by this Court in its prior rulings, such an inquiry would clearly reveal that the NDSU Employees properly proceeded under state law.

The foundation for de Llano's Petition is the assertion that the NDSU President was bound by the recommendations of the SRC which found sufficient grounds for terminating de Llano did not exist. A review of the applicable NDSU policies and the actions of de Llano unquestionably reveal that such an argument is entirely meritless.

In asserting that the SRC decision is final and binding, de Llano wholly ignores portions of the NDSU Faculty Handbook and Policies in an apparent attempt to mislead this Court. There is absolutely no language in the 1994 policy indicating that the SRC's recommendations were final and binding on the President. In fact, quite the opposite is true. The 1994 NDSU Faculty Manual, acknowledged as the applicable version by de Llano, states at subsection 3.d. of Section A:

> d. The faculty governance structure at each institution shall provide for a Special Review Committee to investigate each alleged violation of this policy on an informal basis without a verbatim transcript or the privilege of cross-examination. **A Special Review Committee shall, within thirty calendar days of its receipt of an allegation of violation, investigate the alleged violation and *attempt to resolve the problem*.** If the problem is not resolved, the Special Review Committee shall refer the matter to the Standing Committee on

> Faculty Rights for formal hearing if this policy provides for such hearing. **Recommendations of the Special Review Committee** shall be reported in writing to the complainant, head of the academic unit or program area, dean or academic vice president, and president. Except by mutual consent of the complainant and the president, no complaint shall be heard by the Standing Committee on Faculty Rights until a Special Review Committee has completed its investigation and attempted a solution.
>
> . . .
>
> *Note: A statement entitled "Policies and Instructions for Special Review Committees" has also been approved by the University Senate and is available from the University Attorney.*

(Appendix pp. 225-226) (emphasis added).

The unambiguous language of subsection 3.d. of Section A reveals that the SRC is simply to serve as a possible resolution source in disputes between NDSU and its faculty. Moreover, subsection 3.d. of Section A references the SRC's duty to issue a recommendation. The common definition of recommend means to "present as worthy of acceptance or trial." Webster's Ninth New Collegiate Dictionary 984 (1987). Subsection 3.d. of Section A's language that the SRC was to "attempt a resolution" and issue "recommendations" reveals that the SRC's decision was in no way binding upon either de Llano or NDSU.

However, if some doubt existed in de Llano's mind after reading subsection 3.d. of Section A, all he needed to do was review the "Policies and Instructions for Special Review Committees," as referenced in a note to subsection 3.d. of Section A. The "Policies and Instructions for Special Review Committees," referred to in the "Note" to Subsection 3(d), were prepared more than ten years before the SRC's report was issued in de Llano's case. (Appendix pp. 220-222). The "Policies and Instructions for Special Review Committees" sheds additional light on the limited, non-binding nature of the SRC's authority:

1. As the above excerpts from the Board regulations state, a Special Review Committee has several functions:

    a. To investigate an alleged violation or case referred to it on an informal basis;

    b. To **attempt to resolve** the problem or case;

    c. If the **problem is not resolved** by the Committee, to **refer the matter to the Standing Committee on Faculty Rights** where the Board regulations provide for that alternative (*See* Section C4 above) and;

    d. To **report recommendations** in writing to the complainant, head of the academic unit or program area, dean or academic vice president, or president.

2. Furthermore, the potential role of the Committee in suggesting and negotiating alternative or creative solutions to the conflict, which might be beyond the advocacy — oriented positions of the parties, should be constantly kept in mind. When such informal efforts at ***mediation fail to reach a mutually acceptable conclusion, the Committee's responsibility for a specific case is terminated by its report*** of its recommendation in writing, and where appropriate, its referral of the case to the Standing Committee on Faculty Rights. . . .

3. At NDSU, the **informal mediation role of the Committee** is supported by a definition of Committee membership which follows the arbitration model . . .

. . .

5. . . . Although **Special Review Committees cannot be expected to resolve every single conflict** or case, the NDSU experience with such committees has been very positive and helpful, so that members appointed to such committees should understand that they have an important and constructive **opportunity to play a key role in the mediation of conflicts**, with the objective of helping the parties to a conflict within the University avoid the expense and delay of a formal hearing or even litigation to resolve the problem.

(Appendix pp. 228-230) (emphasis added).

These provisions of NDSU's Faculty Handbook and Policies clearly refute de Llano's assertions that the SRC decision was final and any subsequent proceedings were a violation of his due process rights. The unambiguous language of the Faculty Handbook and Policies reveals that the SRC simply serves as a mediation[1] source to attempt to resolve conflicts early.

Since the SRC's role was advisory in nature, it is clear that someone else had the final authority. That someone else at NDSU was its President. (Appendix p. 222). And, prior to making that final decision regarding de Llano's dismissal, President Ozbun advised de Llano of his right to appeal to the SCFR, where he would receive a formal hearing. (Appendix p. 141). Since de Llano did request a hearing before the SCFR, it is apparent that he acknowledged the non-binding nature of the SRC's recommendation and, thus, waived any argument that the SRC decision was final.[2] Accordingly, President Ozbun's refusal to adopt the SRC's recommendations was not a violation of de Llano's federal due process rights.

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1. Mediation is defined as a "[p]rivate informal dispute resolution process in which a neutral third person, the mediator, helps disputing parties to reach an agreement. The mediator has no power to impose a decision on the parties." Black's Law Dictionary 981 (6th ed. 1990).

2. In his Petition, de Llano states that an NDSU faculty member may only appeal an "unfavorable" SRC decision to the SCFR. *See* Petition at p. 6. There is absolutely no reference in any NDSU policies stating that only an unfavorable SRC decision may be appealed by a faculty member. Instead, as set forth at p. 6 of de Llano's Lodging, the NDSU policies allowed de Llano to appeal to the SCFR after the SRC had issued its recommendations irrespective of what was recommended by the SRC.

CONCLUSION

De Llano has failed to set forth any valid basis in his Petition for concluding that he was denied his federal procedural due process by NDSU or its Employees. De Llano has provided no basis that would justify a reversal or a remand of the Eighth Circuit Court of Appeal's determination. De Llano was given notice of the reasons for his termination on numerous occasions and was allowed to give his side of the story at least three different times. Accordingly, de Llano's Petition for a Writ of Certiorari must be denied.

Respectfully submitted,

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